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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13	)	
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership Limitations	)	
and Anti-Trafficking Provisions	)	

COMMENTS OF GTE
ON
FURTHER NOTICE OF PROPOSED RULE MAKING

GTE Service Corporation ("GTE"), on behalf of the GTE Domestic Telephone Operating Companies and GTE Laboratories Incorporated, hereby responds to the Further Notice of Proposed Rule Making ("Further Notice") in the above-captioned proceeding, FCC 93-332, released July 23, 1993. In the Further Notice, the Commission seeks comment on rules by which it proposes to implement Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), codified at 47 U.S.C.§533(f), calling for "reasonable limits" on the number of subscribers served by any single cable operator and on the extent to which cable operators may carry the programming of suppliers with whom they are affiliated.

GTE retains the interests in this docket described in its Comments of February 9, 1993, as a provider of transmission facilities for alternative multichannel video programming distributors and, prospectively, a programming distributor itself. It remains concerned, as expressed in a Reply of March 3,

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1993, that ownership attribution standards continue to be inappropriately disparate in broadcast, cable TV and telephone regulations, given the technological and functional convergences in these industries. The comments below also address encouragement of new services and relaxation of channel occupancy limits.

The Commission's reasons for distinguishing the application of "broadcast" and "video dialtone" attribution standards are not persuasive.

In the Report and Order issued simultaneously with the Further Notice, the Commission analogized the controls on cable/MMDS and cable/SMATV crossownership to those imposed on cable/telephone affiliation in last year's video dialtone rulemaking, and applied a common "5% equity" standard of ownership attribution. FCC 93-332 at ¶¶104-05 and 124. While the discussion is not lengthy, the reasoning appears to equate the perceived threat of a minority-owning telephone company's influence on a co-located cable system with that of a minority-owning cable system over co-located MMDS or SMATV systems that might otherwise compete with the part-owner.

In the Further Notice, however, a more relaxed standard is proposed for governing the "horizontal" (subscriber limits) and "vertical" (affiliate channel occupancy) reach of cable systems nationally and locally. The Commission tentatively concludes that the more liberal broadcast attribution standards found at 47 C.F.R.§73.3555 are better suited than the singular 5% equity video dialtone ownership limit[1] for the twin purposes of (1) restraining the ability of a single

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[1] While Section 73.3555 uses a similar equity ceiling of 5%, this is applied only to voting interests, and the ostensibly passive interests of investment and insurance companies and banks are non-cognizable up to 10%, as are certain "insulated" limited partnerships. Moreover, where a single shareholder holds more than 50% of the outstanding voting stock, no minority voting stock interest -- even if higher than 5% -- will be attributable as ownership for purposes of the rule.

cable operator to "influence or control management or programming decisions" (¶157) while still (2) encouraging "continued investment in the development of new programming services." (¶198)

The Commission's comparisons of the circumstances where it has applied the video dialtone strict 5% standard with those actual and proposed cases where Section 73.3555 has been used are either (1) distinctions without any real differences, or (2) contradictory. For example, the video dialtone standard is characterized as "designed to ensure competition among rival technologies" while the more liberal attribution rule is aimed at preventing "any one cable operator from impeding the flow of video programming." (Further Notice, ¶158) In the final analysis, however, competition among rival technologies and preventing constriction of program availability have a common objective: Diluting the monopoly power of the currently dominant video distribution technology, cable television.[2]

Similarly unpersuasive is the Further Notice's effort to distinguish the strict 5% standard applied to cable operator/satellite programmer vertical relationships under the program access rules from the more liberal proposal here that would govern vertical relations between a cable operator and any programmer occupying a channel on its system. Despite the characterization of the latter situation as "broader structural constraints," the underlying problem in both cases is the ability of the dominant cable operator to favor affiliates and

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[2] GTE is constrained to remind the Commission once again of the remarkably candid statement of one integrated cable operator/programmer, Viacom International, that "the programmer *must* sell its programming to the cable operator in order to be a viable entity." Comments, MM Docket 92-265 (Program Access), January 25, 1993, 56-57.

disfavor non-affiliates in the carriage of programming, to the potential detriment of program diversity.[3]

By the Commission's own reference (Notice, ¶157) -- and contrary to the implication in the quotation from ¶158 above -- the stricter video dialtone standards have not been consistently applied to "ensure competition among rival technologies." Both the cable TV-broadcast station and cable TV-broadcast network crossownership rules govern relationships between cable operators and broadcast technology rivals, yet both employ the more liberal broadcast attribution standards.[4]

At ¶199, the Further Notice relies on Congressional interest in the positives of cable ownership -- including increased efficiency and investment in quality programming -- as reasons for adopting the more liberal ownership attribution standard to the horizontal and vertical relationships at issue here. The reliance is well placed, but it applies equally aptly to the matter of telephone-cable ownership.

As GTE has stated in this docket and related proceedings, the video dialtone rulemaking also was about investment and efficiency and program diversity.[5] So is the Capital Formation proposal to double the active and passive

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[3] By proposing a different attribution standard for ownership under Section 613(f) than for vertical integration under Section 628, the Commission seems prepared to live with the anomaly that a satellite cable programmer carried on an affiliate's cable system would be considered a threat to competitive program access if either owned, say, 10% of the other's nonvoting stock, but for purposes of measuring affiliate channel occupancy, the risk would be deemed to disappear.

[4] 47 C.F.R.§76.501 (October 1992); *see also*, Report and Order, MM Docket 82-434, 7 FCC Rcd 6156, 6174 (n.74) The Commission's observation that Congress "supports" use of the broadcast attribution standard is a throwaway, since the legislators clearly left selection of the appropriate attribution standard to the discretion of the agency. (Further Notice, n.148) Moreover, the accompanying Report and Order (¶105) cites to the same Senate Report statement to justify imposition of the strict 5% standard to cable/MMDS cognizable ownership.

[5] Reply, March 3, 1993, 4-5; Opposition to Petitions for Reconsideration, MM Docket 92-265 (Program Access), July 14, 1993, 6, n.8.

equity limits in the broadcast attribution rules.[6] Thus there are grounds for fashioning more uniformity in the ownership attribution rules, and for abandoning the less-than-persuasive distinctions in the Further Notice between so-called "rival technology" regulation and "management/program influence" regulation.

GTE believes that the more liberal broadcast attribution standards proposed here for horizontal subscriber limits and vertical channel occupancy ceilings are equally warranted for telephone-cable affiliation under video dialtone and should be adopted on the reconsideration now pending in CC Docket 87-266. GTE cannot speak with the same experience about cable/MMDS and cable/SMATV standards, but if the consequence of reconsidering the video dialtone standard is to raise the ceiling on permissible cable ownership of such systems, the resulting uniformity would be more rational and satisfying policy than the current arbitrary and indefensible variances in affiliation thresholds.

The Commission should encourage new program service investment and carriage by alternative video distributors as well.

At ¶202, the Further Notice asks "whether it would be appropriate to increase the equity threshold or exempt from attribution investments in new programming services." The question is somewhat related to issues in the program access docket, MM 92-265, where such preferred allowances as exclusive contracting and higher affiliation thresholds have been sought for new cable services, especially minority-oriented and educational and informational offerings.

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6 MM Docket 92-51, 7 FCC Rcd 2654 (1992).

The goal of easing the introduction of new and/or less widely viewed programming is laudable, but cable industry investment and distribution ought not be the only way to achieve the objective. Alternative video distributors, including local exchange telephone companies, are demonstrably prepared to back financially and to carry such innovative material.[7] One way to diversify its support and distribution is to limit the now-dominant cable industry to levels of participation which are reasonable for the purpose while still leaving room for alternative investors and carriers.

Plainly, the Commission views the broadcast attribution standards of Section 73.3555 as sufficient to the purpose.[8] The need to raise those ceilings or do away with them altogether in the interest of new programming is unproven, particularly when more than one cable operator could invest up to the ceiling without affecting the new service's carriage (channel occupancy) on a single cable system.[9]

As a means of encouraging investment in and distribution of new services by carriers other than cable operators, GTE encourages the Commission not only to (1) raise the video dialtone attribution standard to uniformity with the broadcast attribution standard, as discussed above, but also to (2) consider liberal

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[7] Among the articles in April-June 1993 issues of *Telecommunications Reports* were "Pacific Bell sets broadband deployment goals, seeks cable TV partners," April 12, page 1; "Rochester Tel, USA Video Corp. finalize video-on-demand test plans," April 12, page 3; and US WEST-Time Warner strategic alliance opens new competitive era," May 24, page 3. In GTE's own 1992 annual report on the Cerritos trials (note 11, *infra*), submitted March 30, 1993, two new GTE-developed interactive services, Main Street™ and ImagiTrek®, are discussed at pages 17-21.

[8] It is particularly impressed by the support of the broadcast attribution standard by the Turner programming interests, beneficiaries of substantial cable MSO investment. Further Notice, ¶195.

[9] At ¶180 of the Further Notice, the Commission reads the 1992 Act to require the application of channel occupancy limits "only to video programmers that are vertically integrated with the particular cable operator." GTE agrees with that interpretation.

waiver treatment -- under the public interest standards of 47 U.S.C.§533(b)(4) and 47 C.F.R.§63.56 -- for local exchange telephone companies proposing to provide new video programming services in their franchised areas.[10]

Channel occupancy limits are not required for cable operators leasing on video dialtone and other open-access carrier systems.

At ¶183, the Further Notice asks how the concept of channel occupancy limits should be applied to switched digital video systems capable of supplying video on demand. The notice also seeks comment on the treatment of information and communications services.

By its terms, the channel occupancy prescription required in 47 U.S.C.§613(f) speaks only to cable operators and video programmers. Increasingly, GTE believes, cable operators and other video programmers may choose to lease channel capacity on video dialtone or other open-platform carrier systems. Such systems are likely to take advantage of the efficiencies of video switching and to be capable of both analog and digital operation.[11]

GTE believes that where a cable operator is but one of many programmers on a video dialtone or analogous system, the 1992 Act would not require channel occupancy limits -- except possibly on a remedial basis. If the cable operator programmer is subject to viable and vigorous intra-system competition from other program suppliers, the extent to which the operator employs affiliated

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[10] GTE recognizes that the video dialtone rules are not directly at issue in this proceeding, but their reconsideration is pending and their relationship to the matters at hand is obvious. GTE has urged and will continue to urge the Commission to take a global view of video distribution and to resist the categorizations convenient only to industry advocates.

[11] GTE has been engaged since 1988 in experiments of this nature at its Cerritos, California test bed, in cooperation with Apollo Cablevision and with multiple vendors of components and services. In keeping with the Commission's waiver grant of April 1989, *General Telephone Company of California,* 4 FCC Rcd 5693, test results have been reported annually to the FCC.

programming is of little or no concern. Only where commercial happenstance produces less than effective intra-system competition might channel use restrictions be required in the interest of consumer protection and program diversity.

GTE advisedly limits this suggestion to the case of video dialtone or analogous open access. Cable operators, of course, may build their own advanced switched digital systems. But if they operate as conventional program controllers and not as common carriers, they retain the incentive and ability to favor affiliates and presumably would remain subject to channel occupancy limits. However, GTE agrees with the Commission's proposal that above a certain relatively high channel threshold -- and assuming the cable operator's continued willngness to abide by Section 612 on commercial leased access -- the restrictions on affiliate occupancy would cease to apply.

With respect to information and communications services carried on cable systems, if these are not classifiable as video programming they need not -- at least under Section 613(f) -- be subjected to the channel occupancy prescription. As the Commission is aware, however, state regulatory authority may come into play with such offerings. 47 U.S.C.§541(d).

CONCLUSION

For the reasons discussed above, the Commission should consolidate the multiplicity of cable ownership attribution standards, including those applicable to telephone crossownership in the context of video dialtone, into a single test conforming to or closely resembling the broadcast attribution rule at 47 C.F.R.§73.3555 (Notes). In GTE's view, such a single standard would be suitable for the encouragement of cable and telephone investment in new services, especially if augmented by crossownership waivers in meritorious cases. Finally,

channel occupancy limits probably need not be applied *a priori*, but only remedially, in the case of cable operators using open-access common carrier systems (such as video dialtone).

Respectfully submitted,

GTE SERVICE CORPORATION

By _____

Ward W. Wueste, Jr., HQE03J43
Marceil F. Morrell, HQE03J35
GTE Telephone Operations
P.O. Box 152092
Irving, Texas 75015-2092
(214)718-6361

James R. Hobson
Jeffrey O. Moreno
Donelan, Cleary, Wood & Maser, P.C.
1275 K Street N.W., Suite 850
Washington, D.C. 20005-4078
(202) 371-9500

August 23, 1993

ITS ATTORNEYS

Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Comments of GTE on Further Notice of Proposed Rulemaking" have been mailed by first class United States mail, postage prepaid, on the 23rd day of August, 1993 to all parties on the attached list.

Ann D. Berkowitz

William J. Andrle, Jr.
Attorney
Tribune Regional Programming, Inc.
435 North Michigan Avenue
Chicago, IL 60611

Fritz E. Attaway
Senior Vice President for Government Rela
Motion Picture Association
of America, Inc.
1600 Eye Street, NW
Washington, DC 20006

Mark R. Boyes
Attorney
Affiliated Regional Communications, Ltd.
600 Las Colinas Boulevard
Suite 2200
Irving, TX 75039

Daniel L. Brenner
National Cable Television
Association, Inc.
2445 M Street, NW
Suite 225
Washington, DC 20037

Bertram W. Carp
Turner Broadcasting System, Inc.
810 First Street, NW
Suite 620
Washington, DC 20002

William J. Catto
Attorney
Haag & Deutschman
452 Pleasant Grove Road
Inverness, FL 34452

Jud Colley
President
Community Broadcasters Association
P.O. Box 191229
Dallas, TX 75219

Seth A. Davidson
Fleischman and Walsh
1400 16th Street, NW
Suite 600
Washington, DC 20036

David L. Donovan
V.P. Legal & Legislative Affairs
Association of Independent Television
Stations, Inc.
1200 18th Street, N.w.
Suite 502
Washington, DC 20036

Christopher B. Fager
Senior Vice President
E! Entertainment Television, Inc.
5670 Wilshire Boulevard
Los Angeles, CA 90036

Celeste M. Fasone
Director
State of New Jersey
Board of Regulatory Commissioners
Two Gateway Center
Newark, NJ 07102

Peter H. Feinberg
Attorney
Dow, Lohnes & Albertson
1255 Twenty-third Street, NW
Suite 500
Washington, DC 20037

Paul J. Feldman
Attorney
Fletcher, Heald and Hildreth
1300 North 17th Street
Eleventh Floor
Rosslyn, VA 22209

Gardner F. Gillespie
Attorney
Hogan & Hartson
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

Michael E. Glover
Attorney
Bell Atlantic
1710 H Street, N.W.
Washington, DC 20006

Neal M. Goldberg
Attorney
Hopkins & Sutter
888 16th Street, NW
Washington, DC 20006

Donna Coleman Gregg
Attorney
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

John L. Grow
Attorney
New York State Commission
on Cable Television
Corner Tower Building
Empire State Plaza
Albany, NY 12223

Larry M. Haag
County Attorney
Office of the County Attorney
Citrus County
107 N Park Avenue
Suite 8
Inverness, FL 34450

Michael H. Hammer
Attorney
Willkie, Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

Arthur H. Harding
Attorney
Fleischman and Walsh, P.C.
1400 16th Street, N.W.
Suite 600
Washington, DC 20036

Robert L. Hoegle
Attorney
Carter, Ledyard & Milburn
1350 I Street, NW
Suite 870
Washington, DC 20005

David A. Irwin
Attorney
Irwin, Campbell & Crowe
1320 18th Street, NW
Suite 400
Washington, DC 20036

Louis A. Isakoff
General Counsel
International Family Entertainment, Inc.
100 Centerville Turnpike
Virginia Beach, VA 23463

David J. Kaufman
Attorney
Brown Finn & Nietert, Chartered
1920 N Street, N.W.
Suite 660
Washington, DC 20036

Gene Kimmelman
Legislative Director
Consumer Federation of America
1424 16th Street, N.W.
Suite 604
Washington, DC 20036

Robert Lemle
Senior Vice President/General Counsel
Cablevision Systems Corporation
One Media Crossways
Woodbury, NY 11797

Frank W. Lloyd
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004-2608

W. James MacNaughton
Attorney
90 Woodbridge Center Drive
Suite 610
Woodbridge, NJ 07095

Stephen S. Madsen
Attorney
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Martin T. McCue
Vice President/General Counsel
United States Telephone Association
900 19th Street, N.W.
Suite 800
Washington, DC 20006-2105

Judith A. McHale
General Counsel/Senior Vice President
Discovery Communications, Inc.
5500 Wisconsin Avenue
Bethesda, MD 20814

Mark J. Palchick
Attorney
Baraff, Koerner, Olender & Hochberg
5335 Wisconsin Avenue, NW
Suite 300
Washington, DC 20015-2003

Philip V. Permut
Attorney
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Thomas C. Power
Attorney
Winston & Strawn
1400 L Street, NW
Suite 700
Washington, DC 20005

Garret G. Rasmussen
Attorney
Patton, Boggs & Blow
2550 M Street, NW
Washington, DC 20037

Thompson T. Rawls, II
Attorney
BellSouth Telecommunications, Inc.
4300 Southern Bell Center
675 West Peachtree Street, NE
Atlanta, GA 30375

Henry M. Rivera
Attorney
Ginsburg, Feldman & Bress Chartered
1250 Connecticut Avenue, NW
Washington, DC 20036

Stephen R. Ross
Ross & Hardies
888 16th Street, NW
Suite 300
Washington, DC 20006

Robert J. Sachs
Senior Vice President
Continental Cablevision, Inc.
Pilot House, Lewis Wharf
Boston, MA 02110

Robert G. Scott
Attorney
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Paul J. Sinderbrand
Attorney
Sinderbrand & Alexander
888 16th Street, NW
Suite 610
Washington, DC 20006-4103

Norman M. Sinel
Attorney
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, DC 20036

Bruce D. Sokler
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004-2608

Howard J. Symons
Attorney
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004-2608

R. Clark Wadlow
Attorney
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

David Waterman
Adjunct Professor
University of Southern California
Annenberg School for Communication
3502 South Hanover Street
Los Angeles, CA 90089-0281